STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**)**	
On Its Own Motion	**)**	
	)	
	)	**No. 01-0662**
Investigation Concerning Illinois Bell Telephone	**)**	
Company's compliance with Section 271 of the	**)**	
Telecommunications Act of 1996.	**)**	

SBC ILLINOIS' STATEMENT OF POSITION REGARDING COMMISSION CONDITIONS IN POST- EXCEPTIONS PROPOSED ORDER (PHASE II)

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INTRODUCTION

Illinois Bell Telephone Company ("SBC Illinois" or "the Company"), by its attorneys, hereby submits its Statement of Position Regarding Commission Conditions in Post-Exceptions Proposed Order (Phase II) in this proceeding.

On April 30, 2003, the Post-Exceptions Proposed Final Order on Investigation ("PEPO" or "Modified Order") in the captioned 271 proceeding was distributed to the parties. In the Administrative Law Judge's Ruling distributed at the same time, SBC Illinois was directed to indicate in writing its acceptance or rejection of any actions now required under the Modified Order. The Ruling further requested the Company to indicate whether any directive or requirement needs to be clarified. SBC Illinois was further ordered to update and resubmit Attachments A and B to the Modified Order. SBC Illinois addresses these new requirements below separately by checklist item (i.e., items 2 and 4) and by subject matter, where it is not a checklist item (i.e., the performance assurance plan). Updated Attachments A and B are attached to this Statement.

DISCUSSION

I. CHECKLIST ITEM 2

A. The Filing of UNE Rate Changes (PEPO, ¶ 888)

The Original Order in this proceeding accepted the agreements reached by SBC Illinois and Staff regarding reductions that would be made in certain UNE rates and resolved the one disputed issue regarding non-recurring charges. The only change made by the Modified Order is that SBC Illinois is now required to file these tariff changes within 45 days of the date of the Commission's Final Order. (PEPO, ¶ 888). SBC Illinois accepts this requirement.

B. EEL Performance Measurement (PEPO, ¶¶ between ¶¶ 891 and 892)

The Original Order accepted SBC Illinois' commitment to add language to its tariffs to address its obligation to provision EELs in a manner that would not impair or impede CLECs' ability to use EELs to compete in Illinois. In the PEPO, the Company is now further obligated to specifically account for its conversion certification process (and any similar certification processes applied to new EELs) in its performance measurement system by adding a diagnostic measure that assesses the duration of the certification process. This diagnostic measure must meet with Staff's approval. (PEPO, new ¶¶ between ¶¶ 891 and 892). SBC Illinois accepts this requirement.

In particular, SBC Illinois commits to develop a new diagnostic performance measure that will assess the timeliness in which SBC Illinois completes its activities in certifying a CLEC request to migrate existing Special Access circuits to EELs circuits. To the extent that new EELs requests also require certification, the timeliness of SBC Illinois' completion of its certification activities for such requests will be included in the same measure. This performance measure will be presented to the ICC Staff for review and input, and appropriate changes, additions or deletions will be made such that SBC Illinois and ICC Staff agree that the defined measure is sufficient. Implementation of the resulting measure will be dependent upon reaching consensus agreement on that measure with the Illinois CLECs participating in the next six-month review collaborative, scheduled to commence in the July/August 2003 timeframe.

C. Line Loss Notifications (PEPO, ¶ 1339)

The Original Order accepted SBC Illinois' commitments to date relative to the Line Loss Notice issues and requested comments from Staff on whether further action was required. Following review of Staff's additional recommendations, the Modified Order (¶ 1339) required SBC Illinois to implement the following:

> 1) SBC Illinois will make line loss performance measure MI 13, a remedied performance measure. If tiers are applicable to the performance remedy plan then the measure will have a medium weight for both tier 1 and tier 2 payments or comparable remedy level;
>
> 2) SBC Illinois will implement all changes to performance measures MI 13 and MI 13.1 agreed upon in the last performance measurement six month review session including the clarification that all line loss notices generated due to SBC Illinois winback scenarios are included in the MI 13 and MI 13.1 performance measurements;
>
> 3) SBC Illinois shall file revised tariff pages with the Commission for the changes it will make to performance measure MI 13 and MI 13.1 based upon this Order and the Company's commitments in this order, such that the effective date of the tariff will coincide with the implementation date of the performance measurement changes;
>
> 4) SBC Illinois shall closely monitor the line loss notifications it provides to CLECs until such time as SBC Illinois provides a full six months of line loss notifications without any new problems being uncovered and without any of the existing or prior problems having resurfaced.

SBC Illinois accepts these requirements.

D. Billing (PEPO, ¶ 1358)

The Modified Order subjects PM 17 (billing timeliness) to additional monitoring at this time, as set out in Jim Ehr's Surrebuttal Affidavit, because the PM itself will soon be revised. (PEPO, ¶ 1358). SBC Illinois accepts this requirement.

E. Performance Improvements (PEPO, ¶¶ 1371-72, 1382)

The Modified Order requires SBC Illinois to (1) remedy its current unsatisfactory performance on PMs 7.1, 13, 17, MI-2, MI-14, and 37-4 and (2) demonstrate substantially improved performance on these PMs by November 2003 or face the possibility of additional penalties. (PEPO, ¶¶ 1371-72, 1382). The Company must commit to exercise "its best efforts to remedy each OSS and performance measurement deficiency that remains unresolved in accord with this order." (PEPO, ¶ 3680).

SBC Illinois hereby commits to use its good-faith, best efforts to remedy performance shortfalls in PMs 7.1, 13, 17, MI-2, MI-14, and 37-4, in accordance with the Order. In some instances, that will be accomplished by improving performance. In other instances, that will be accomplished by modifying the relevant PM or standard to more appropriately address the performance being measured. For example, as explained in SBC Illinois' Brief on Exceptions and as accepted in the Modified Order, SBC Illinois has reached agreement with the CLECs to revise PM 17 to provide a more accurate comparison between wholesale and retail performance and, once PM 17 is revised, SBC Illinois' performance may be satisfactory. (SBC Illinois Br. on Exc. at 5-6).

II. CHECKLIST ITEM 4

Similar to the Modified Order's requirements under Checklist Item 2, the Modified Order requires SBC Illinois to exercise its best efforts to remedy its performance on PMs C WI-6-02, 59-03, 65-03, 65.1-03, 67-03, 67-18, and 66-03, and to continue monitoring PM 55. (PEPO, ¶¶ 1864, 1868, 1871, and 3680). SBC Illinois hereby commits to use its good-faith, best efforts to remedy any shortfalls in PMs C WI-6-02, 59-03, 65-03, 65.1-03, 67-03, 67-18, 66-03, and to continue monitoring PMs 55.

III. PUBLIC INTEREST

A. General

The Modified Order requires that SBC Illinois do the following:

1. SBC Illinois commit to complete any and all remedial actions we deemed necessary to achieve compliance with the Commission's Phase I Interim Order.

2. SBC Illinois commit to exercising its best efforts to remedy each OSS and performance measurement deficiency that remains unresolved in accord with this order. (These actions will further be verified by an independent third party).

3. SBC Illinois commit to report to the Commission bi-monthly on progress toward meeting all remaining requirements, an obligation commencing on with the issuance of this Final Order and containing through competition of all required activity.

4. SBC Illinois commit to participate in a collaborative composed of Staff, the Company and all interested parties, to facilitate and monitor SBCI's progress toward eliminating the deficiencies indicated in the review of the 3-month PM data results.

(PEPO, ¶ 3680). SBC Illinois accepts these commitments.

B. Proposed "Remedy Plan."

The April 8, 2003 Original Proposed Order addressed in depth SBC Illinois' performance assurance or "remedy" plan and found the Plan (with some modifications) to be sufficient for purposes of Section 271. In its Brief on Exceptions, SBC Illinois accepted the Section 271 Plan, as modified in the Original Order. SBC Illinois sought clarification that the modifications in the Original Order did not preclude SBC Illinois and a CLEC from agreeing (in a negotiated interconnection agreement) to the original language proposed by SBC Illinois, and the Modified Order (¶ 3622) reflects this clarification.

The Modified Order adds other conditions regarding the Section 271 Plan. SBC Illinois accepts the Modified Order's recommendations that (i) SBC Illinois "demonstrate to Staff, the way it develops its results" for remedies under the Section 271 Plan (¶ 3569), (ii) the Plan's "mini-audit" language be offered to all CLECs "and, to the extent that it qualifies as a change-of-law provision, [that] it will become controlling across all plans" (¶ 3581), (iii) that a review of the Plan begin in approximately 36 months, and that the Plan be offered until the conclusion of that proceeding (¶ 3596). SBC Illinois proposes one clarification with respect to that review proceeding: that the Commission limit the duration of the proceeding to one year, unless the parties agree to an extension beyond one year. The purpose of the proceeding would be to consider whether there remains any need for a "remedy plan" and if so, what the terms of the plan would be going forward. A one-year period should be more than sufficient to accommodate a reasonable proceeding on those matters and any scheduling issues or extensions that may be required, but it would remove any incentive for carriers to stretch out the proceedings indefinitely for the sole purpose of extending the duration of the Section 271 Plan.

SBC Illinois also agrees to modify its existing tariff in accordance with the Modified Order and to offer CLECs the opportunity to opt into the Section 271 Plan. As the Modified Order correctly recognizes (¶ 3571), the Commission has clearly stated that the previously tariffed 0120 Plan would be effective "only <u>up to and until</u> a wholesale performance plan for Section 271 purposes is approved by this Commission," and the "Compromise Plan" proposed by SBC Illinois "is now the approved Section 271 Plan."

However, one statement in the Modified Order needs to be clarified. After (correctly) stating that the 0120 Plan would be replaced for <u>tariff</u> purposes and for <u>"opt-in"</u> purposes, the Modified Order then states (¶ 3583) that "those CLECs preferring to continue with their current remedy plans (if deemed lawful), such as the 0120 Plan . . .

should be allowed to continue with that existing remedy plan until such time as they either renegotiate a new remedy plan, or the term of their current interconnection agreement expires." This statement appears to be founded on a misunderstanding of the interrelationship between the 0120 Plan and the interconnection agreements in place today. In fact, the statement is contrary to (1) the Commission's order in the Alternative Regulation docket, (2) the terms of interconnection agreements, and (3) the Commission's decision here approving the Section 271 Plan. In addition, it represents unwise public policy.

The Commission's Order in the Alternative Regulation docket expressly and unconditionally stated that the 0120 Plan would remain in effect <u>only</u> "up to and until a wholesale performance plan for Section 271 purposes is approved by the Commission." (PEPO, ¶ 3571 (quoting Alt Reg Order, at 190)). That event has now occurred, and the Modified Order expressly referred to the Alt Reg Order in stating that "[t]he Compromise Plan is now the approved Section 271 Plan and will be known and referenced by such terms." (PEPO, ¶ 3571). By the plain terms of the Alt Reg Order, then, the 0120 Plan no longer remains in effect.

The Modified Order correctly applied this principle for purposes of the tariff, and for future interconnection agreements, but for some reason assumed a different result for existing agreements. The paragraph at issue provides:

> The Commission also directs SBC Illinois to modify the terms of its existing tariff in accordance with this Order. In addition, to ensure that the plan here found to be suitable in preventing backsliding is widely implemented, SBCI need commit to offering CLECs the opportunity to opt-in to the plan approved in this proceeding, that also being the performance remedy plan offered under SBCI's Alternative Regulation Plan. We agree with Staff that this might help to ensure, over time, that with the greatest possible number of CLECs taking the plan approved in this proceeding, the remedy amounts SBCI will pay thereunder most

> closely resemble the dollar amounts provided in this proceeding. *As to those CLECs preferring to continue with their current remedy plans (if deemed lawful), such as the 0120 Plan, they should be allowed to continue with that existing remedy plan until such time as they either renegotiate a new remedy plan, or the term of their current interconnection agreement expires.* PEPO, ¶ 3583 (emphasis added).[1]

This disparity may reflect an unspoken assumption that expiration of the 0120 Plan would constitute an alteration of such agreements. In fact, there is no operative difference between the 0120 Plan tariff and the 0120 Plan amendments to interconnection agreements. In both instances the Company offered the 0120 Plan because it was mandated by the Commission's Order in that docket. These were not provisions that were negotiated by the parties. Typically, the interconnection agreement amendment simply incorporates by reference the Commission's order. Thus, once the Commission replaces the 0120 Plan with the Section 271 Plan pursuant to this Order and the Alt Reg Order, it is replaced for all purposes — both tariff and contract.

In reality, then, the statement in the Modified Order conflicts with existing interconnection agreements. As stated above, the 0120 Plan was not the product of a negotiation or arbitration under the federal Telecommunications Act of 1996. It exists because the Commission ordered it. While an interconnection agreement may incorporate such orders by reference, the terms of the agreement also recognize that orders may be changed, and it typically accommodates such changes by a change-of-law or analogous provision, or by the incorporation provision itself. Those provisions would thus mean that the interconnection agreement tracks the Commission's order

[1] The sentence in italics should be modified as follows: As to those CLECs preferring to continue with their current remedy plans <u>(except for interconnection agreement plans that incorporate the expired 0120 Plan)</u>, they should be allowed to

(cont'd)

replacing the 0120 Plan with the Section 271 Plan.[2] To the extent that the Modified Order is construed to extend the operation of the 0120 Plan notwithstanding the existence or terms of a change-of-law or incorporation provision, it would represent an unlawful modification of the agreement.

The Modified Order's statement regarding the 0120 Plan is also contrary to the reasoning of the Modified Order adopting the Section 271 Plan. The Modified Order states that the 0120 Plan "is a product of its time and circumstance," and was based on performance during the latter months of 2000. Id. ¶ 3543. Today, the Modified Order acknowledges, "the environment in which we are analyzing SBC Illinois' Compromise Plan is much changed" and SBC Illinois' wholesale performance has significantly improved. Id. ¶ 3545. The Modified Order correctly finds that the 0120 Plan is inappropriate to the current performance environment, as it "would require SBC Illinois to make 'remedy' payments of approximately $3 million each month, or $36 million annually, despite good performance." Id. ¶ 3548. As the Modified Order acknowledges, "[t]hat amount is over nine times the amount of payments that would have been found sufficient by the FCC for purposes of section 271. It is also muddles the message and suggests a level of unfairness." Id.

(… cont'd)

continue with that existing remedy plan until such time as they either renegotiate a new remedy plan, or the term of their current interconnection agreement expires.

[2] The Modified Order itself provides (¶ 3581) that the "mini-audit" language of the Section 271 Plan "will become controlling across all plans" "to the extent that it qualifies as a change-of-law." There is no reason to treat the Plan itself differently. Further, the Modified Order states that the 0120 Plan will not be extended, even for interconnection agreements, if it is found unlawful. The same treatment should apply to the Commission's present order finding the 0120 Plan to be excessive, inappropriate, and in need of modification.

The Modified Order thus adopts as a policy goal that the "remedy amounts SBCI will pay … [should] most closely resemble the dollar amounts provided in this proceeding". Id. ¶ 3583. However, by assuming that the 0120 Plan (if lawful) would survive in agreements until the agreement expires or the parties otherwise renegotiate a remedy plan, the 0120 Plan could continue on for a considerable period of time. First, existing agreements have to expire. For recently executed agreements, the 0120 Plan could extend for several years. Further, the Modified Order is unclear whether the 0120 Plan would terminate immediately when the agreement expires, or whether it would continue during the period that new agreements are negotiated or arbitrated. Even once they are arbitrated and the subject of a final Commission order, it can take a considerable period of time to agree on final language changes implementing the order, even when both parties have every incentive to complete the process expeditiously. If the Commission adopts the latter approach – i.e. that the 0120 Plan, with its very high payments, continues as long as there is no final signed agreement – it would create negative incentives to delay all stages of this agreement process. Such a result is directly contrary to the Commission's policy objectives stated in the Modified Order.

Finally, the Modified Order's statement regarding the 0120 Plan would result in disparate treatment among carriers. First, carriers taking service under tariff would move immediately to the Section 271 Plan, while carriers under agreements would not. Even within the universe of carriers operating under agreements, some carriers would continue under the 0120 Plan for a long time, while other carriers would not, based on the expiration dates of their individual agreements. The 0120 Plan and the Section 271 Plan are both state-ordered plans that were adopted to implement the Commission's policy at a particular point in time. Continuation of the 0120 Plan for some carriers, and not others, based solely on the way they took service and the expiration dates of their interconnection agreements, is inappropriate where the Commission is implementing statewide policy.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' STATEMENT OF POSITION REGARDING COMMISSION CONDITIONS IN POST-EXCEPTIONS PROPOSED ORDER (PHASE II)** was served on the following parties by regular U.S. Mail and/or electronic transmission on May 2, 2003.

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